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711-412—63— 1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 429

SEAWAY BEVERAGES, INC., PETITIONER

v.

C. DOUGLAS DILLON, SECRETARY OF THE TREASURY OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 34–39) is reported at 319 F. 2d 722.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1963 (Pet. 40), and a petition for rehearing was denied on June 3, 1963 (Pet. 41). The petition for a writ of certiorari was filed on September 3, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was substantial evidence to support the Secretary's finding that, in the light of its sole stockholder's association with reputed racketeers in an earlier beer distributing business, the petitioner corporation was not likely to maintain operations as a wholesaler and importer of beer in conformity with federal law.

2. Whether that finding justified the Secretary's denial, under § 4(a)(2)(B) of the Federal Alcohol Administration Act (27 U.S.C. 204(a)(2)), of petitioner's application for a permit to distribute beer.

STATUTE INVOLVED

Sections 3(e), 4(a), and 5(a) of the Federal Alcohol Administration Act, 49 Stat. 977 (as amended, 27 U.S.C. 201 *et seq.*) are set forth in relevant part in the Appendix, pp. 15–16, *infra*.

STATEMENT

1. From 1953 to 1959, Dominic Volpe was the sales manager and, after 1956, the president of Premium Beer Sales, Inc., an importer and wholesaler of malt beverages in Chicago, Illinois. All of the stock of Premium was owned by Henry Morgen, who died on March 3, 1959. Following Morgen's death, Volpe formed and became the sole stockholder and president of a new corporation which, on August 11, 1959, purchased Premium's inventory, office equipment, and trucks (R. 447).[1] On August 31, 1959, the new corpo-

[1] "R." refers to the printed Joint Appendix filed in the court of appeals.

ration, petitioner Seaway Beverages, Inc., filed applications under § 4 of the Federal Alcohol Administration Act (27 U.S.C. 204) for the necessary permits to engage in business as an importer and wholesaler of malt beverages.[2]

On December 6, 1960, the Assistant Regional Commissioner of the Alcohol and Tobacco Tax Division of the Internal Revenue Service notified petitioner that its applications would be denied unless it requested a hearing within the time prescribed. The notice stated the following ground for the proposed denial (R. 40, 42):

> The applicant, by reason of the business experience and trade connections of Dominic Volpe, President, Treasurer, Director and sole stockholder thereof, is not likely to maintain operations in conformity with federal law within the meaning of Section 4(a)(2)(B) of the Federal Alcohol Administration Act * * * in that:
>
> 1. During the period 1953–1956, while sales manager of Premium Beer Sales, Inc., Dominic Volpe knowingly associated with and caused to be employed as a beer salesman one Jack Cerone, a person alleged to be of ill repute and a member of a group of hoodlums headed by Anthony J. Accardo.
>
> 2. During the period 1956–1959, while President of Premium Beer Sales, Inc., Dominic Volpe knowingly associated with and assisted in the employment as a beer salesman of An-

[2] Pending final disposition of its applications, petitioner, as Premium's successor, has been permitted to engage in business under Premium's permits, as authorized by § 4(g) of the Act.

thony J. Accardo, alias Tony Accardo, alias Joe Batters, a person of ill repute and alleged leader of Chicago hoodlums.

In due course, petitioner requested a hearing. Following a hearing, the hearing examiner filed a recommended decision denying the applications (R. 420–455). The Assistant Regional Commissioner overruled petititoner's exceptions and, with slight modifications, adopted the hearing examiner's findings and recommended decision (R. 467–481). The Director of the Alcohol and Tobacco Tax Division affirmed the Assistant Regional Commissioner's decision and, exercising the power delegated to him by the Secretary of the Treasury, entered a final order denying petitioner's applications (R. 487–497). The court of appeals, on direct review of the order under § 4(h) of the Act, affirmed (Pet. 34–39).

2. The denial of the permits was based entirely on Volpe's relationship, while sales manager and president of Premium, with Cerone and Accardo. The facts of that relationship may be summarized as follows:

Volpe first met Cerone in 1948 or 1949, when Cerone was engaged in selling neon signs to taverns. In late 1955 or early 1956, on Volpe's recommendation, Cerone was hired by the Fox Head Brewing Company as a salesman in the area for which Premium was Fox Head's distributor (R. 425, 447–448, 469). Volpe later introduced Cerone to Arthur Feicht, the president of Fox Head (R. 448). Volpe, Cerone and Feicht thereafter took a trip together to the brewery in Wisconsin and met on various other occasions, including

one time at Cerone's home (R. 448–449, 438). On one occasion, Cerone told Feicht, in Volpe's presence, that he knew someone who could sell "one hundred times" as much beer as he could, mentioning Accardo's name. A short time later, Cerone took Feicht and Volpe to Accardo's home, where they were introduced to Accardo and discussed his possible employment by Fox Head (R. 449, 439). A week or two later, Volpe attended a meeting at the Armory Lounge in Forest Park, Illinois, with Accardo, Feicht, Cerone and others at which Accardo's employment by Fox Head was discussed further. (R. 449). The board of directors of Fox Head decided not to hire Accardo, but on or about May 1, 1956, Volpe, who had just been made president of Premium, signed an employment contract between Premium and Accardo (R. 449, 424). The contract required Premium to pay Accardo (or, if he should die after a year's service, his heirs) $65,000 a year for four and a half years, purportedly for his services as a salesman (R. 449–450, 426). Premium continued to make payments to Accardo, with checks signed by Volpe, until it ceased doing business in 1959 (R. 450). There is some indication in the record, but no finding, that Fox Head was to reimburse Premium for its payments to Accardo (R. 424, 312–313).

Volpe's other associations with Accardo and Cerone while he was president of Premium included the following: he and Feicht attended an Italian festival where they met Accardo; he attended a Fourth of July party at Accardo's home in 1956 and at Cerone's

home in 1957; he took messages to Accardo's home on several occasions; Accardo and Cerone attended a christening of Volpe's child in 1957; he went with Cerone on trips to New York and Florida to see distributors; and he went on a five-day fishing trip in the Bahamas with Accardo and Cerone (R. 449–450).

3. It was found that both Accardo and Cerone were persons with "a very bad reputation" in the Chicago area (R. 451). Petitioner took no exception to those findings. Nor did it challenge the basic facts of Volpe's dealings with Accardo and Cerone. Volpe claimed, however, that in all of his contacts with them he was acting on orders of Henry Morgen, the sole stockholder of Premium, and that he did not read the Accardo contract before signing it (at Morgen's direction), and learned of its contents only several days later.

The hearing examiner (R. 445, 455), the Assistant Regional Commissioner (R. 475), and the Director all rejected Volpe's disclaimers of responsibility as not worthy of belief, with the Director concluding that "Volpe's testimony is at variance with probable facts and legitimate inferences" (R. 495). Alternatively, the Director found that, even if Volpe's claim of total dominance by Morgen were true, it would only establish Volpe to be a mere "tool" who, having been so "weak" and easily dominated in the past, would not be "likely to so conduct the affairs of the applicant corporation as to keep them immune from racketeer influences and to maintain operations in conformity with Federal law" (R. 494).

After reviewing Volpe's participation in Accardo's employment, the Director found (R. 491):

> The record discloses that Anthony J. Accardo has a reputation in the Chicago area as a racketeer. * * * The very terms of the employment contract, and the facts and circumstances surrounding his employment, smack of a racketeer operation and indicate that Accardo was employed because of his reputed underworld connections and his ability to influence, if not actually coerce, purchases by retail outlets.

Inasmuch as Volpe had thus "permitted a person with the reputation of a racketeer to enter the alcoholic beverage business," the Director concluded that "I am not convinced from the record in this case that, if permits were to be issued, a similar result could not reasonably be expected" (R. 493). He accordingly adopted the recommended finding that, in view of its sole stockholder and president's demonstrated willingness to deal with reputed racketeers in the distribution of alcoholic beverages, the "applicant is not likely to maintain operations in conformity with Federal law" and denied the applications (R. 497, 454). The court of appeals, as noted above, affirmed the order (Pet. 34–39).

ARGUMENT

1. Petitioner contends that Volpe's prior role as president and sales manager of a company that utilized, in the sale and distribution of alcoholic beverages, the services of persons with notorious reputations as racketeers (Cerone and Accardo) was not a

sufficient basis for the denial of a permit to his corporation under § 4(a) of the Federal Alcohol Administration Act. The contention is without merit.

a. A primary purpose of the permit system established by the Act was to keep the alcoholic beverage industry free from the racketeer influences to which Congress believed it to be peculiarly subject. As explained in the committee reports (H. Rep. 1542, 74th Cong., 1st Sess., p. 3; S. Rep. 1215, 74th Cong., 1st Sess., p. 2):

> The bootlegger and the racketeer have not yet disappeared from our national life. Under existing Federal law there is no means of keeping the criminal from entering the legalized liquor field. The executive branch of the Government (except to a limited extent in the case of distilleries) is powerless to prevent the most notorious criminal from entering into the business of production or distribution of alcoholic beverages. The revenue cannot be adequately protected, the "tied-house" control cannot be curbed, [*] the public cannot be protected from unscrupulous advertising, the consumer cannot be protected from deceptive labeling practices; in short, the legalized liquor traffic cannot be effectively regulated, if the door is let open for highly financed gangs of criminals and racketeers to enter into the business of liquor production and distribution.

Taking note that there were "extraordinary incentives" in the liquor business "to ignore requirements of law" and that the "history of the enforcement of

[*] Section 5(a) of the Act makes it unlawful for any wholesaler of alcoholic beverages to require any retailer, by agreement or otherwise, to purchase exclusively from it.

liquor laws in this country has been characterized by wide-spread violations and evasions," the committee concluded that "Relatively drastic enforcement methods, such as the permit system, therefore become necessary." H. Rep. 1542, *supra*, at p. 6. It is in the light of that history that the broad power of the Secretary to deny a permit to any person he finds "is, by reason of his business experience * * * or trade connections, not likely * * * to maintain * * * operations in conformity with Federal law" must be construed.

Despite petitioner's attempt so to characterize it, this case does not involve the denial of a permit on the basis of an applicant's mere "associations." The decision of the Director turned, not upon Volpe's associations at large, but upon his direct participation in the hiring of a person with a reputation as a notorious racketeer to be a "salesman" of alcoholic beverages. Nor was Accardo's reputation merely coincidental to an otherwise innocent transaction, for it was found that he was hired specifically "because of his reputed underworld connections and his ability to influence, if not actually coerce, purchases by retail outlets" (R. 491). The decision was thus based on findings of specific conduct directly demonstrating Volpe's willingness to utilize coercive racketeer influences in the distribution of alcoholic beverages. If those findings are supported by the evidence, they fully justified the denial of a permit to Volpe's wholly-owned corporation. And whether the evidence does support the findings—

as we submit it plainly does—is obviously not a question warranting further review by this Court.

b. Petitioner's contention that Volpe's participation in the relevant events was "involuntary" is not only contrary to the findings but is in any event immaterial. What petitioner means by "involuntary" (see Pet. 18–19, 27) is that it was necessary for him to do the things he did if he wanted to keep his job. But the desire to protect a capital investment is no less strong a motivating force than the desire to keep a job, and from Volpe's demonstrated willingness to participate in bringing reputed racketeers into the alcoholic beverage industry when his job depended upon it, it was reasonable, we submit, for the Director to draw the inference that Volpe would be likely to pursue a similar course in the future if the financial success of his new corporation should depend upon it. The crucial fact is that, with full knowledge of what was happening, Volpe chose to remain associated with the enterprise—and, hopefully, to share in whatever fruits the new alliance might bring to Premium.*

2. The suggestion, if petitioner means to make it (Pet. 23), that the statutory standard is so imprecise as to be unconstitutional as a delegation of legislative power is answered by *Ma-King Products Co.* v. *Blair*, 271 U.S. 479. There, the Commissioner of Internal Revenue had denied an application under the National Prohibition Act for a permit to operate

* Contemporaneously with the hiring of Addardo, Morgen promised Volpe an increase from 25 percent to 40 percent in his bonus participation in Premium's earnings (R. 308, 320).

an alcohol-denaturing plant because the principal officers of the applicant had been conveyancers for a savings and loan association some of the directors of which had, in turn, been charged with liquor-law violations. Unlike the present statute, that Act did not prescribe the grounds on which permits might be denied. Relying upon its use of permissive rather than mandatory language, however, this Court construed the Act as authorizing the Commissioner "to refuse a permit to one who is not a suitable person to be entrusted, in a relation of such confidence, with the possession of liquor susceptible of diversion to beverage uses" (p. 482). The Court accordingly affirmed the decision of the court of appeals that "the associations and business connections of the principal officers of the company were such that [the Commissioner] had ample ground for declining to issue the permit" (p. 483).

In authorizing the Secretary to deny a permit to any person he finds "is, by reason of his business experience * * * or trade connections, not likely * * * to maintain such operations in conformity with Federal law," the present statute simply makes express the power this Court found implicit in the earlier legislation. If the National Prohibition Act, as interpreted in *Ma-King*, did not delegate an overly broad discretion, *a fortiori* the delegation in the more explicit Federal Alcohol Administration Act is valid.

3. Petitioner complains, finally, of the introduction into evidence of Accardo's conviction, later reversed, for making false statements in income tax returns,

of Accardo's income tax returns, and of newspaper clippings describing Accardo as the reputed leader of Chicago racketeers (Pet. 26-32). Those exhibits, however, were only cumulative evidence going to Accardo's reputation as a racketeer, a reputation that had already been established by the direct testimony of the Director of the Chicago Crime Commission (R. 66) and the Deputy Superintendent of Police in Chicago (R. 57, 61) and by evidence of admissions made by Accardo in Volpe's presence (R. 91, 301, 320). In any event, at no time has petitioner ever excepted to the findings of the bad reputations of Cerone and Accardo (see R. 457-466, 4[illegible]-487), and the issue is now foreclosed by the provision of § 4(h) of the Act that "No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure to do so." Indeed, since petitioner does not even now challenge the ultimate findings as to Cerone's and Accardo's reputations, the relevance of its objections to the evidence underlying those findings is not apparent.[5]

[5] We note, however, that the Director expressly disclaimed reliance on the reversed conviction (R. 497), and that the newspaper publicity given to Accardo's reputation as a racketeer had a peculiar relevance here because the very fact of publicity would add to the coercive influence that Accardo's association with Premium would have upon prospective customers. See R. 491.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1963.

APPENDIX

Sections 3(c), 4(a), and 5(a) of the Federal Alcohol Administration Act, 49 Stat. 977 (as amended, 27 U.S.C. 201 *et seq.*) provide in part as follows:

SEC. 3. In order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages:

* * * * *

(c) It shall be unlawful, except pursuant to a basic permit issued under this chapter by the Secretary of the Treasury—

(1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages; or

(2) for any person so engaged to receive or to sell, offer or deliver for sale, contract to sell, or ship, in interstate or foreign commerce, directly or indirectly or through an affiliate, distilled spirits, wine, or malt beverages so purchased.

* * * * *

SEC. 4. (a) The following persons shall, on application therefor, be entitled to a basic permit:

* * * * *

(2) Any other person unless the Secretary of the Treasury finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to the date of application, been convicted of a felony under Federal or State law

or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

* * * * * *

SEC. 5. It shall be unlawful for any person engaged in business as * * * an importer or wholesaler, of distilled spirits, wine, or malt beverages, * * * directly or indirectly or through an affiliate:

(a) *Exclusive outlet.*—To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engaged in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or * * *.

U.S. GOVERNMENT PRINTING OFFICE 1943